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No. 99-1690

In The

Supreme Court of the United States

CITY OF HOUSTON,

Petitioner,

v.

JOHN E. KOLB, JAMES W. McCARTNEY, WILLIAM M. LINDEN, RAYMOND S. MAISLIN, O. SCOTT ROGERS, BETTY PULASKI WESTON, B. RED, INC., RACHEL S. KOLB, DAVE KAMINSKY, ROBERT I. KAMINSKY, STEPHEN KAMINSKY, CHARLES D. KOLB, JAMES R. SUD, TRUSTEES OF THE JUDITH SUD & BETTY P. SUD TRUST, AND J. E. ROUSSEL,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas

PETITIONER'S REPLY BRIEF

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The Brief in Opposition Misunderstands the *Michigan v. Long* Doctrine.

Article I, section 17, of the Texas Constitution, which was the sole provision cited in the district court judgment, may be an adequate state ground for decision. It must, however, also be an independent ground if the case is to fall outside this Court's jurisdiction. Here, it clearly is not an independent ground as federal and state law are intertwined. This is apparent when one looks to *Mayhew*, the Texas Supreme Court case that establishes the Texas rule for ripeness of regulatory takings claims and that was the basic authority for the Texas court of appeals' decision in *Kolb*. There is no question that it is appropriate to look to the rationale of the cases cited by the challenged opinion to determine if federal and state law are intertwined for purposes of the *Michigan v. Long*[1] analysis. *E.g.*, *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990). In *Mayhew*, the plaintiff asserted and the court decided both state and federal takings claims. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 927-28, 940 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999). The Texas Supreme Court expressly based its decision on the state ripeness issue on federal law. *Id.* at 929 n.1. The Texas ripeness standard set out in *Mayhew*, and relied on by the court of appeals, is, at the very least, intertwined with federal law. Where the state court interprets its own constitution in the manner it believes federal law requires, the state law does not provide an independent basis for decision, and

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[1] 463 U.S. 1032 (1983).

this Court has jurisdiction to review the case. *E.g., Delaware v. Prouse*, 440 U.S. 648, 652-53 (1979) (cited with approval in *Michigan v. Long*, 463 U.S. at 1038 n.4, 1042 n.8).

Kolb argues that the *Mayhew* court brought the Texas ripeness rule out from under the *Michigan v. Long* presumption because it "made it clear that it looked to the federal law for '**guidance**' and did not state that it was '**compelled**' to decide the case based on federal law." Brief in Opposition at 8. Kolb both misreads *Mayhew* and turns the *Michigan v. Long* rule on its head. The *Mayhew* court used the word "guidance" only once in its opinion, and that was in a parenthetical explanation to a *"cf"* citation. *Mayhew*, 964 S.W.2d at 929. All the court said was that it had looked to federal law for guidance in deciding *another* case involving *another* issue – i.e., standing. This is hardly a "plain statement . . . that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached," as required by *Michigan v. Long*. *Long*, 463 U.S. at 1041.

Certainly, the second half of the *Michigan v. Long* requirement – i.e., a statement that federal law does not compel the result – is not satisfied by *Mayhew*. In fact, *Mayhew* expressly states that *"we need not determine whether we are compelled by federal supremacy to rely on federal law* because, in determining the ripeness of the Mayhews' regulatory takings claims in this case, we apply federal jurisprudence." *Mayhew*, 964 S.W.2d at 929 n.1 (emphasis added). The problem with Kolb's argument in his brief in opposition is that he has this part of the *Michigan v. Long* test backwards. If the Texas Supreme Court wanted to avoid application of the *Michigan v. Long*

presumption, it was required to expressly state in its opinion that it was not compelled by federal law to decide the case the way it did. By expressly indicating that it was *not* making such a statement, it precluded an escape from the *Michigan v. Long* presumption that this Court has jurisdiction to review the case.

The Brief in Opposition Focuses on Irrelevant and Non-existent Issues and Largely Ignores the Ripeness Issue Raised by the Petition.

The city's petition is based on its assertion that Kolb's takings claim was not ripe. The brief in opposition largely ignores the central issue of ripeness and instead focuses on peripheral points and on issues the trial and appellate courts would never have reached had they properly determined that the claim was not ripe. *E.g.*, Brief in Opposition at 10-11.

Kolb claims that the city "misleads this court by stating that all [he] had to do was reflect the route of the Grand Parkway (State Highway 99) on [his] application for subdivision plat." Brief in Opposition at 2 (footnote omitted). Kolb misses the point. No one has suggested that amending the application to show the route of the freeway would guarantee approval. An amended application might or might not be approved. It would, however, give the city the opportunity to decide what use, if any, of the property will be permitted. Until the city has the opportunity to make that decision, a court has no way to know what, if anything, has been taken, and the claim is not ripe.

Kolb suggests that he is excused from ever submitting a meaningful application since the court found that

no application would be approved absent a dedication of right-of-way for the freeway. Brief in Opposition at 9. That finding, however, is based on the statements of city staff members, not on the final and authoritative determination by the decision-making body required by this Court's ripeness jurisprudence. Pet. 12-14. Further, even if it were appropriate to find that the city would impose this requirement without evidence of any formal or informal action by the city's decision-makers, the case would still not be ripe. This is not an exaction case in which a landowner objects to a city's requirement that land be dedicated. The plaintiffs sought no damages to reflect the value of the land to be dedicated, and no property was, in fact, transferred to the city or to any other governmental entity. Instead, the plaintiffs' claim was that the failure to approve the application amounted to a taking of the value of the entire tract. That claim was not and could not be ripe until the city had an opportunity to act on a meaningful application and to determine what use of the property would be permissible.

Kolb's argument has attempted to jump past the ripeness issue and to pose the question in terms of required dedication. Before those issues can be reached, however, the cause must be ripe. By declining to file a meaningful application, Kolb prevented his claim from being ripe for judicial decision. When the focus is on the point actually raised in the petition – i.e., that the claim is not ripe – it is clear that Kolb's argument misses the mark.

Finally, Kolb asserts that the petition does not show where the federal question was raised below as required by Rule 14(g)(i). Brief in Opposition at 9. The petition, however, states in no uncertain terms that the ripeness issue in this case was decided on the basis of federal law.

Petition at 8. The petition indicated that this issue was raised in the county court, the court of appeals, and the Texas Supreme Court. Petition at 4-5, 7. Excerpts from the pleadings in each of the three Texas courts were attached to show that the ripeness issue was raised and that it was argued on the basis of federal law. Pet. App. at 39, 41, and 44.

CONCLUSION

This case decided an important federal question in a way that conflicts with relevant decisions of this Court. If left uncorrected, it will permit an erosion of a critical part of this Court's takings jurisprudence. The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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